STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM LUBANSKI,

Plaintiff-Appellant,

v

NLC, INC., d/b/a LENCO, DETROIT AUTOBODY EQUIPMENT, INC., CEBOTECH, INC., and TECNA, S.P.A.,

Defendants-Appellees.

UNPUBLISHED
July 20, 2010

No. 291106
Macomb Circuit Court
LC No. 2007-001197-NH

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

In this products liability case, plaintiff William Lubanski appeals as of right from the trial court's order granting summary disposition in favor of defendants NLC, Inc., d/b/a Lenco; Detroit Autobody Equipment, Inc.; Cebotech, Inc.; and Tecna, S.p.A. We affirm.

I. BASIC FACTS

Lubanski works as a "body frame tech," doing auto body repair. In 2003, Lubanski's employer, Distinctive Motorcars, purchased a new portable spot welder from Detroit Autobody. An Italian company, Tecna, designed and manufactured the welder. Cebotech imported the welder to the United States for distribution; Cebotech then sold the welder to Lenco, who marketed and sold the welder to Detroit Autobody.

The welder consists of a welder unit attached to a four-wheeled cart. (We use "welder" to refer to the entire assembly including the cart, reflecting the usage of the parties and the trial court. "Welder unit" refers to the actual machine that is mounted on the cart). The welder unit is attached to the top of one side of the cart; it is not centered on the cart. The cart has a pole with an arm (the "suspension arm") that extends upwards and from which hangs a retractable pulley. The welding gun is at the end of a cable that extends from the welder unit and is held aloft by the suspension arm and pulley. (The parties refer to both a "cable" and "cables." We use "cable" because the collection of several lines is bundled together into one cable). The pulley allows the user to raise and lower the cable and keep it from dragging on the ground or on the user's body. There is also a handle extending from the cart on the side where the welder is attached. Lubanski stated in his deposition that the welder was designed to be moved by the handle and that the welder weighs 285 pounds.

According to Lubanski, on February 7, 2005, he was using the welder to make a series of welds on the underside of a car frame, which was resting on a car stand. He was lying on his back and side in a way that made his right arm free to work. He had been working for approximately one and a half to two hours, making a series of spot welds about an inch to an inch and a half apart from one another. He was slowly moving away from the welder as he worked, but he never needed to move the welder while he was lying down working. In order to work at that level, he lowered the support strap on the suspension arm that held the cable to provide access under the car but keep the cable from resting on his chest as he worked. The cable is very hot during use of the welder. This was the first time Lubanski had used the welder while lying on the floor.

As Lubanski was welding, the welder suddenly fell over on top of him. One part of the welder struck him in the head. The cart fell onto his right side, fracturing his right ankle and crushing his right wrist. He has undergone numerous surgeries and lost full use of his wrist. No witnesses saw the accident.

Lubanski stated that he did not hear or feel anything prior to the welder falling onto him. He was not facing the cart, so he does not know whether the cart moved before the accident. At the time the cart fell, he was moving from one spot weld to the next, but he was not pulling the cart by the cable. He stated that there remained slack in the cable. He also stated that the floor was flat and clear, with no cords or other objects blocking the wheels. He was unable to provide any explanation for why the welder fell over when it did. He had used the welder several times a week since Distinctive Motorcars acquired it in 2003, and it had never tipped over before.

In June 2007, Lubanski filed a complaint alleging negligence and a breach of implied and express warranties against Lenco, Cebotech, and Detroit Autobody. In September 2007, Lubanski amended the complaint to add Tecna as a defendant. In August 2008, Cebotech and Tecna moved for summary disposition on the grounds that the connection between the alleged defect and Lubanski's injury was speculative, there was no express warranty, and Cebotech was a non-manufacturing seller not subject to liability under MCL 600.2947(6). Detroit Autobody filed a concurrence with Cebotech and Tecna's motion. In September 2008, Lenco moved for summary disposition on the grounds that causation was speculative, that Lubanski had failed to demonstrate that Lenco did not exercise reasonable care, and that their express warranty had expired.

Lubanski responded that there were genuine issues of material fact regarding causation and that there remained genuine questions of material fact regarding Lenco's, Cebotech's, and Detroit Autobody's negligence based on the failure to warn regarding reasonable foreseeability of the danger of maneuvering the welder by the cable. Finally, Lubanski argued that MCL 600.2947(6) did not preclude a breach of implied warranty claim against a non-manufacturing seller because the Legislature did not intend to remove all remedies against non-manufacturing sellers.

The trial court held a hearing on defendants' motions in September 2008 and issued a written opinion and order in October 2008, granting summary disposition in favor of defendants. On the issue of causation, the trial court concluded:

> [T]here is no evidence in the record explaining why either alleged defect [the instability and small wheels] would have caused the welder to suddenly fall over. The mere fact that the welder may have an off-center center of gravity or too small wheels does not explain—especially in light of the fact that plaintiff testified the welder had never previously fallen over while being used, he was not pulling on the cable at the time of the accident and he was unaware of anything impeding the welder's movement—why the welder would have mysteriously fallen over on the day in question. Indeed, there is no logical sequence of cause and effect between the asserted defects and the subject incident.

The trial court also concluded that the "dearth of evidence as to the actual reason why the welder tipped over" rendered Lubanski's claims of a breach of implied warranty unavailing. Finally, the trial court acknowledged that Lubanski admitted that there was insufficient evidence to demonstrate a breach of express warranty. Lubanski moved for reconsideration, but the trial court denied the motion. Lubanski now appeals.

II. CAUSAL CONNECTION

A. STANDARD OF REVIEW

Lubanski argues that the trial court erroneously concluded that there was no genuine issue of material fact regarding causation. Lubanski argues that there was no other reasonable explanation for his injury other than that the alleged defects caused his injuries. Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court must consider the record in the same manner as the trial court.[1] Any court considering such a motion must consider all the pleadings and the evidence in a light most favorable to the nonmoving party.[2] However, the motion tests whether there exists a genuine issue of material fact,[3] and it is not sufficient for a party to promise to offer factual support for his claim at trial.[4] Conjectures, speculations, conclusions, and mere allegations or denials are not sufficient to

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[1] *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005).

[2] *Id.*

[3] *Id.*

[4] *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *Smith v Globe Life Ins, Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999).

create a question of fact for the jury.[5] We review de novo a decision to grant a motion for summary disposition.[6]

B. LEGAL STANDARDS

The Michigan Supreme Court explained in *Skinner v Square D Co*[7] that:

> Under Michigan products liability law, as part of its prima facie case, a plaintiff must show that the manufacturer's negligence was the *proximate cause* of the plaintiff's injuries. We have previously explained that proving proximate cause actually entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also known as "proximate cause."

The Court further stated that "plaintiffs may utilize circumstantial proof to show the requisite causal link between a defect and an injury in products liability cases."[8]

The bulk of case law regarding causation and product defects usually revolves around competing theories of causation.[9] In order for a theory of causation to survive a motion for summary disposition, there must be at least some "basis in established fact" in support of the theory.[10] It must be appear "more likely than not" that the defect caused the injury.[11] In order to be submitted to a jury, a plaintiff's theory of causation must stand out from other possible theories.[12] It cannot simply be equally possible as another theory of causation.[13] Evidence must be "more than a mere possibility," or probable rather than just possible.[14]

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[5] *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995); *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994); *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

[6] *Hines*, 265 Mich App at 437.

[7] *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994) (emphasis in original; internal citations omitted).

[8] *Id.* at 163.

[9] See *id.* at 171-172.

[10] *Id.* at 164-165, 165 n 9.

[11] *Id.*

[12] *Id.* at 164-165, 172.

[13] *Id.* at 164-165, 165 n 9.

[14] *Id.* at 165 (quotation and citation omitted).

C. APPLYING THE STANDARDS

Here, Lubanski stated repeatedly that he did not know the reason the welder tipped over. He did not see it tip over. There was nothing obstructing the welder. The floor was flat. The welder was not moving at the time of the accident. He did not pull the welder by its cable. The only thing that was changing or moving at the time the welder fell was that Lubanski was moving inch-by-inch between welds. Lubanski stated, however, that there was slack in the cable at the time the welder fell and that he was not moving the cart by the cable. Further, he had been working in this manner for over an hour. Nothing in Lubanski's deposition testimony explains why the welder fell; indeed, he expressly stated that he does not know why the welder fell.

Lubanski's only attempt at proffering a possible theory of causation was to contend that the welder was insufficiently stable to support the exceptionally low height at which he was using the welder gun. And Lubanski's expert stated that 30 pounds of horizontal force would cause the welder to tip. He did not, however, identify what amount of horizontal force is placed on the welder when the cables are suspended so low or when one is using the welder gun as Lubanski was.[15]

Lubanski has failed to present any evidence, circumstantial or direct, creating a "logical sequence of cause and effect" between the alleged defects and the injury in this case.[16] This is especially true because Lubanski had never observed the welder tip or fall over in hundreds of uses and failed to present evidence that would explain why the welder would fall over in this particular instance. We cannot say that Lubanski's theory of causation is more or less possible than any other theory because he has not provided an actual theory of causation. Rather, Lubanski relies on the juxtaposition of the alleged defects and his injury as being sufficient.[17] This total lack of evidence regarding an actual sequence of events that caused the welder to tip renders any conclusion regarding causation merely speculative.[18]

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[15] See *Craig v Oakwood Hosp*, 471 Mich 67, 92-93; 684 NW2d 296 (2004) (discussing difference in expert testimony establishing correlation but not causation); *Jordan v Whiting Corp*, 396 Mich 145, 151; 240 NW2d 468 (1976) (stating that expert testimony must provide more than mere possibility).

[16] *Schedlbauer v Chris-Craft Corp*, 381 Mich 217, 224; 160 NW2d 889 (1968) (quotation and citation omitted); but see *Scott v Illinois Tool Works*, 217 Mich App 35, 38-40; 550 NW2d 809 (1996) (holding that a theory with only minimal evidence of causation is "marginally sufficient" to be submitted to jury).

[17] See *Craig*, 471 Mich at 92 (stating that evidence must demonstrate *how* negligence led to injury); *Jordan*, 396 Mich at 150 ("Plaintiff's expert witness could not testify as to decedent's location on the crane or whether the grounding had any causal connection with his death."); see also *Skinner*, 445 Mich at 169 (discussing and applying "purely hypothetical situations" of *Jordan*).

[18] See *LaMothe*, 214 Mich App at 586; *Cloverleaf Car Co*, 213 Mich App at 192-193.

Lubanski's remaining arguments—that defendants breached an implied warranty for failing to warn of the danger of tipping and that defendant Lenco should be liable as an "apparent manufacturer"—are of no avail because of the same failure to demonstrate a causal link between the alleged negligence or defects and Lubanski's injury.

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck